

No. SC85166

IN THE SUPREME COURT OF MISSOURI

State ex rel. ANDRE TAYLOR,
Petitioner,

vs.

STEVEN MOORE, Superintendent,
Western Missouri Correctional Center,
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

PETITIONER'S BRIEF

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JURISDICTIONAL STATEMENT

This is an original proceeding based upon a petition for writ of habeas corpus challenging the lawfulness of Petitioner's confinement in the Western Missouri Correctional Center in Cameron, Missouri, under the authority of Respondent. Petitioner has previously petitioned the Circuit Court of Dekalb County and the Missouri Court of Appeals, Western District, both unsuccessfully. Therefore, jurisdiction is proper in this Court under the Missouri Constitution, Article I, Section 12 and Article V, Section 4; and under Section 532.020, RSMo, and under Civil Rule 91.

STATEMENT OF FACTS

Petitioner Andre Taylor is currently imprisoned at Western Missouri Correctional Center in Cameron, Missouri. Respondent Steven Moore is the Superintendent of the Western Missouri Correctional Center.

On October 12, 1999 Mr. Taylor appeared before The Honorable Vernon Scoville III of the Circuit Court of Jackson County, Missouri (the “trial court”). (Appendix, A1). On that date, Mr. Taylor pleaded guilty to three counts of First Degree Trafficking in Drugs, in violation of Section 195.222, RSMo, and one count of Second Degree Trafficking in Drugs, in violation of Section 195.223, RSMo.¹ (Appendix, A17; Appendix, A18; Appendix, A1).

Part of the plea offer by the State was that Mr. Taylor be placed into a Long Term Drug Treatment Program pursuant to Section 217.362, RSMo (“LTDTTP”). (Appendix, A1, 3:3- 3:6, 5:13 – 5:21). After Mr. Taylor accepted the State’s offer, the trial court sentenced Mr. Taylor to fifteen years’ imprisonment in CR99-01875, with Long Term Drug Treatment to be provided pursuant to Section 217.632, RSMo. (Appendix, A17). After Mr. Taylor accepted the State’s offer, the trial court sentenced Taylor to ten years’ imprisonment in CR99-02305, with Long Term Drug Treatment to be provided pursuant to Section 217.632, RSMo. (Appendix, A18). The fifteen year and ten year terms were ordered to be served concurrently. (Appendix, A17). The trial court

¹ All references to RSMo are to 1994.

made explicit on the record, and it was all parties' understanding, that when (but not whether) Mr. Taylor would enter the LTDTP was contingent upon the result of unrelated criminal proceedings against Mr. Taylor in St. Francois County, over which the trial court had no control. (Appendix, A1, 3:19 – 5:21, 14:5 – 14:14; Appendix, A17; Appendix, A18).

Mr. Taylor's counsel's representation to Mr. Taylor, both before and after the October 12, 1999 plea and sentencing, was that if Mr. Taylor successfully completed the LTDTP, Mr. Taylor should "serve 9 to 18 months on these fifteen year sentences." (Appendix, A20). Mr. Taylor's counsel represented that when (but not whether) Mr. Taylor would serve these nine to eighteen months was contingent upon the result of unrelated criminal proceedings against Mr. Taylor in St. Francois County, over which the trial court and Mr. Taylor's counsel had no control. (Appendix, A19-20).

There is no indication on the record that the trial court notified MODC before imposing a sentence that included sending Mr. Taylor to the LTDTP. There is no indication on the record that the Missouri Department of Corrections ("MODC") screened Mr. Taylor to determine his eligibility for the LTDTP before sentencing. There is no indication on the record that Mr. Taylor's counsel put before the trial court the issue of Mr. Taylor's eligibility for LTDTP under Section 217.362, RSMo, or indeed that Mr. Taylor's counsel conferred with Mr. Taylor on this issue in any way. (Appendix, A1).

After Mr. Taylor was sentenced and transferred to the custody of MODC, MODC determined that Mr. Taylor was not in fact eligible for the LTDTP. After MODC

informed Mr. Taylor's plea counsel of this development, Mr. Taylor's counsel informed Mr. Taylor of the reasons MODC had determined him ineligible for the LTDTP by letter of January 19, 2000. (Appendix, A21).

MODC based its ineligibility determination on two factors. First, Mr. Taylor had criminal convictions from the year 1983 that rendered him statutorily ineligible for the LTDTP. This basis for ineligibility is infinite. Second, Mr. Taylor was sentenced to a seven-year prison term from proceedings in St. Francois County, where Mr. Taylor was not sentenced to the LTDTP. Therefore, until that sentence was completed, Mr. Taylor could not begin the LTDTP. This basis for ineligibility terminates when Mr. Taylor completes his sentence from St. Francois County.

Sometime before January 12, 2001, Mr. Taylor contacted Judge Scoville of the trial court, advising Judge Scoville of his predicament. On January 12, 2001, Judge Scoville returned correspondence to Mr. Taylor, stating that would have "seriously and probably modified your sentence" had Mr. Taylor not received "administrative segregation for a violation of the rules" at Crossroads Correctional Center. (Appendix, A22).

In 2001, Mr. Taylor complained to the Missouri Supreme Court Region IV Disciplinary Committee about his counsel's handling of the proceedings in CR99-01875 and CR99-02305. The Missouri Supreme Court Region IV Disciplinary Committee admonished Mr. Taylor's counsel for his conduct, or lack thereof, in CR99-01875 and CR99-02305. Specifically, Mr. Taylor's counsel was admonished for "failure to

represent your client in a competent manner” and “failure to be diligent in your representation of your client.” (Appendix, A23).

Mr. Taylor petitioned the Circuit Court of DeKalb County, Missouri for a writ of habeas corpus on the matters being contested herein. On November 22, 2002, that petition was denied. Mr. Taylor next petitioned the Missouri Court of Appeals, Western District for a writ of habeas corpus on the matters being contested herein. On January 15, 2003, that petition was denied. (Appendix, A24).

After Mr. Taylor petitioned this Court for a writ of habeas corpus, the Court appointed The Honorable Carl D. Gum, Jr., as Master to hold an evidentiary hearing and recommend findings of fact and conclusions of law. (Appendix, A25). After holding the evidentiary hearing on November 13, 2003, Master Gum recommended that Mr. Taylor’s petition for writ of habeas corpus be granted.

POINTS RELIED ON

- I. PETITIONER IS ENTITLED TO A JUDGMENT THAT HE IS UNLAWFULLY CONFINED, AND AN ORDER GRANTING HIM A WRIT OF HABEAS CORPUS AND RELEASING HIM FROM RESPONDENT'S CUSTODY, BECAUSE THE JUDGMENT OF THE TRIAL COURT WAS ENTERED OUTSIDE THE JURISDICTION OF THE TRIAL COURT BY THE TRIAL COURT'S ACCEPTING PETITIONER'S PLEA AND SENTENCING PETITIONER TO A LONG TERM DRUG TREATMENT PROGRAM WITHOUT NOTIFYING THE MISSOURI DEPARTMENT OF CORRECTIONS OR HAVING PETITIONER SCREENED BY THE MISSOURI DEPARTMENT OF CORRECTIONS AS REQUIRED BY SECTION 217.362, RSMO, AND THEREBY RENDERING PETITIONER'S PLEA VOID.**

State ex rel. Dutton v. Sevier, 83 S.W.2d 581 (Mo. banc 1935)

State ex rel. Osowski v. Purkett, 908 S.W.2d 690 (Mo. banc 1995)

Merriweather v. Grandison, 904 S.W.2d 485 (W. D. Mo. 1995)

Ex Parte Coder, 44 S.W.2d 179 (Mo. App. 1931)

Section 217.362, RSMo

II. PETITIONER IS ENTITLED TO A JUDGMENT THAT HE IS UNLAWFULLY CONFINED, AND AN ORDER GRANTING HIM A WRIT OF HABEAS CORPUS AND RELEASING HIM FROM RESPONDENT'S CUSTODY, BECAUSE THE JUDGMENT OF THE TRIAL COURT WAS ENTERED AFTER PLEA COUNSEL RENDERED INEFFECTIVE ASSISTANCE TO PETITIONER IN CONSULTATION LEADING TO PETITIONER'S PLEA BY FAILING TO CONSIDER OR ADVISE PETITIONER AS TO THE ELIGIBILITY REQUIREMENTS FOR LONG TERM DRUG TREATMENT UNDER SECTION 217.362, RSMO, WHICH INEFFECTIVE ASSISTANCE CAUSED PETITIONER TO PLEAD GUILTY IN ANTICIPATION OF ENTERING SAID LONG TERM DRUG TREATMENT PROGRAM, FOR WHICH PROGRAM PETITIONER WAS NOT IN FACT ELIGIBLE.

Brown v. State, 66 S.W.3d 721, 730 (Mo. banc 2002)

Covey v. Moore, 72 S.W.3d 204, 210-11 (W. D. Mo. 2002)

Strickland v. Washington, 466 U.S. 668, 687 (1984)

Hill v. Lockhart, 474 U.S. 52, 58 (1985)

Section 217.362, RSMo

III. PETITIONER IS ENTITLED TO A JUDGMENT THAT HE IS UNLAWFULLY CONFINED, AND AN ORDER GRANTING HIM A WRIT OF HABEAS CORPUS AND RELEASING HIM FROM RESPONDENT'S CUSTODY, BECAUSE THE TRIAL COURT COMMITTED ERROR IN SENTENCING PETITIONER TO A LONG TERM DRUG TREATMENT PROGRAM UNDER SECTION 217.362, RSMO, FOR WHICH PROGRAM PETITIONER WAS NOT IN FACT ELIGIBLE.

Brown v. Gammon, 947 S.W.2d 437 (W. D. Mo. 1997)

Brown v. State, 66 S.W.3d 721, 730 (Mo. banc 2002)

Covey v. Moore, 72 S.W.3d 204, 210-11 (W. D. Mo. 2002)

Section 217.362, RSMo

ARGUMENT

I. PETITIONER IS ENTITLED TO A JUDGMENT THAT HE IS UNLAWFULLY CONFINED, AND AN ORDER GRANTING HIM A WRIT OF HABEAS CORPUS AND RELEASING HIM FROM RESPONDENT'S CUSTODY, BECAUSE THE JUDGMENT OF THE TRIAL COURT WAS ENTERED OUTSIDE THE JURISDICTION OF THE TRIAL COURT BY THE TRIAL COURT'S ACCEPTING PETITIONER'S PLEA AND SENTENCING PETITIONER TO A LONG TERM DRUG TREATMENT PROGRAM WITHOUT NOTIFYING THE MISSOURI DEPARTMENT OF CORRECTIONS OR HAVING PETITIONER SCREENED BY THE MISSOURI DEPARTMENT OF CORRECTIONS AS REQUIRED BY SECTION 217.362, RSMO, AND THEREBY RENDERING PETITIONER'S PLEA VOID.

This is an original writ proceeding in this Court, in which this Court is not applying a standard of review to a decision of a lower court.

Trial courts act outside their jurisdiction when they take actions not authorized by the constitution or by statute. *See State ex rel. Stewart v. Tillman*, 533 S.W.2d 699, 700-01 (Mo. App. 1976); *State ex rel. Wiggins v. Hall*, 452 S.W.2d 106, 108 (Mo. 1970); *Pearson Drainage Dist. v. Erhardt*, 201 S.W.2d 484 (Mo. App. 1947); *compare Merriweather v. Grandison*, 904 S.W.2d 485, 486 (W. D. Mo. 1995) ("A sentence which is in excess of that authorized by law is beyond the jurisdiction of the

sentencing court”). A trial court acting outside its jurisdiction is an appropriate basis for this Court to offer habeas corpus relief. **Brown v. State**, 66 S.W.3d 721, 723, 730-31 (Mo. banc 2002). Jurisdictional defects cannot be waived. **Merriweather**, 904 S.W.2d at 489.

Jurisdiction has been defined as “the *power* of the justice, to render the judgment under and pursuant to which the prisoner is held.” **Ex Parte Coder**, 44 S.W.2d 179, 191 (Mo. App. 1931). A few years after *Coder*, this Court similarly stated, in **State ex rel. Dutton v. Sevier**, 83 S.W.2d 581, 582 (Mo. banc 1935), that “the court must have power to render the particular judgment in the particular case before it can be said to have jurisdiction” (emphasis added). Cf. **Griggs v. Venerable Sister Mary Help of Christians**, 238 S.W.2d 8, 13 (Mo. App. 1951) (same analysis applies not just to lack of jurisdiction, but to “excess of jurisdiction”).

Here, the trial court had no power, if it did not meet the statutory requirements of Section 217.362, RSMo, to render the *particular judgment* of sentencing Mr. Taylor to the long term drug treatment program (“LTDTTP”) prescribed in that statute. Such a sentence would, and did, exceed the jurisdiction of the trial court.

The trial court did act outside its statutory authority, and thereby exceeded its jurisdiction, when it accepted Petitioner Andre Taylor’s plea, and sentenced Mr. Taylor to the LTDTTP prescribed by Section 217.362, RSMo. When a trial court is considering any offender for the LTDTTP under Section 217.362, RSMo, the trial court “shall notify the department [MODC]” before sentencing. **Section 217.362(2), RSMo.**

This notification leads to the MODC's responsibility to screen the offender for eligibility for the LTDTP. **Id.** Only "if an offender is eligible" does Section 217.362, RSMo, confer jurisdiction on "the court [to] sentence a person to the program [LTDTP]." **Section 217.362(2), RSMo.**

The trial court did not in fact meet the statutory requirement to notify MODC before sentencing Mr. Taylor to the LTDTP on October 12, 1999. Nor did MODC screen Mr. Taylor for his eligibility for the program, as required by the statute, before Mr. Taylor was sentenced.

Therefore, because Mr. Taylor was not eligible for the LTDTP, and because the trial court did not notify the MODC of Mr. Taylor's potential to be placed in the LTDTP, as required by statute, Section 217.362 did not confer jurisdiction on the trial court to sentence Mr. Taylor to the LTDTP. Without jurisdiction to act in the manner it did, the trial court's judgments are void.

The requirement that the trial court follow the requirements of Section 217.362 to have jurisdiction to enter the sentence it did, is directly analogous to the maxim that trial courts do not have jurisdiction enter sentences in excess of statutorily-mandated maximums for the crimes of which defendants have pleaded guilty or been convicted. For example, this Court recently decided that a trial court did not have jurisdiction to sentence a defendant, after guilty plea, to a fifteen-year term for attempted sodomy, when the statutory maximum was seven years. *State ex rel. Osowski v. Purkett*, 908 S.W.2d 690, 691 (Mo. banc 1995). Under *Purkett*, while a trial court would

theoretically have the jurisdiction to sentence a defendant to prison for attempted sodomy, and a trial court would theoretically have the jurisdiction to sentence a defendant to prison for fifteen years under appropriate circumstances, it *did not have jurisdiction to sentence that particular defendant to prison for fifteen years for attempted sodomy*. Similarly, in the case before this Court, while the trial court would theoretically have the jurisdiction to sentence Mr. Taylor to prison to fifteen or ten year terms for the crimes to which he pleaded, and the trial court would theoretically have the jurisdiction to sentence Mr. Taylor to the LTDTP if he were eligible, it *did not have jurisdiction to sentence that particular defendant to the LTDTP when it did not meet the statutory requirements before sentencing*.

It was established at the November 13, 2003 evidentiary hearing in this matter that had Mr. Taylor known he was not eligible for the LTDTP, he would not have accepted the plea offer – instead, he would have taken his chances at trial. The practical effect of the trial court’s acting outside its jurisdiction was that the trial court sentenced Mr. Taylor to a fifteen-year term and a ten-year term on CR99-01875 and CR99-02305, to run concurrently, when Mr. Taylor believed his guilty pleas in these two matters would result in a single nine- to eighteen-month LTDTP stint, to be served either consecutively or concurrently with his unrelated sentence from St. Francois County. (Appendix, A1; Appendix, A4). Because the promised LTDTP component of Mr. Taylor’s plea agreement was inextricably bound up in Mr. Taylor’s decision to accept the entirety of the plea agreement under which he was sentenced, the trial court’s lack of jurisdiction to

sentence Mr. Taylor to LTDTP requires a finding that the trial court lacked jurisdiction to enter the entirety of the sentences that it imposed.

II. PETITIONER IS ENTITLED TO A JUDGMENT THAT HE IS UNLAWFULLY CONFINED, AND AN ORDER GRANTING HIM A WRIT OF HABEAS CORPUS AND RELEASING HIM FROM RESPONDENT'S CUSTODY, BECAUSE THE JUDGMENT OF THE TRIAL COURT WAS ENTERED AFTER PLEA COUNSEL RENDERED INEFFECTIVE ASSISTANCE TO PETITIONER IN CONSULTATION LEADING TO PETITIONER'S PLEA BY FAILING TO CONSIDER OR ADVISE PETITIONER AS TO THE ELIGIBILITY REQUIREMENTS FOR LONG TERM DRUG TREATMENT UNDER SECTION 217.362, RSMO, WHICH INEFFECTIVE ASSISTANCE CAUSED PETITIONER TO PLEAD GUILTY IN ANTICIPATION OF ENTERING SAID LONG TERM DRUG TREATMENT PROGRAM, FOR WHICH PROGRAM PETITIONER WAS NOT IN FACT ELIGIBLE.

This is an original writ proceeding in this Court, in which this Court is not applying a standard of review to a decision of a lower court.

A. Availability of 'Cause and Prejudice' Relief

At the time applicable to Mr. Taylor, Rule 24.035 required individuals who had pleaded guilty to crimes to raise "claims that the conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States, including claims of ineffective assistance of trial and appellate counsel, that the court imposing the sentence was without jurisdiction to do so, or that the sentence imposed was

in excess of the maximum sentence authorized by law” within ninety days of being delivered to the custody of MODC. **Mo. R. Crim. Pro. 24.035 (2000).**²

Claims that were cognizable in a Rule 24.035 proceeding may be brought in a petition for writ of habeas corpus if “the person asserts he could not bring within the time limits set out in that rule” the claims being asserted. ***Brown v. State***, 66 S.W.3d 721, 730 (Mo. banc 2002). One acceptable reason for failure to bring Rule 24.035 claims is that the claims “were not known to the movant within the period set out in the rule, for such claims could never be brought within the rule’s time limitations.” ***Id.*** at 728.

Mr. Taylor did not have the factual knowledge within ninety days of being transferred to MODC custody to file a Rule 24.035 motion asserting the grounds for relief being asserted in this action.³ In fact, the first time Mr. Taylor learned of his denial of entry into the LTDTP was on or after January 19, 2000, when his counsel informed

² As noted *supra* Section I, regardless of the language quoted from Rule 24.035, claims of failure of trial court jurisdiction are never waived. See ***Merriweather***, 904 S.W.2d at 489.

³ Mr. Taylor’s lack of *factual* knowledge distinguishes this case from ***Brown v. State***, 674 S.W.2d 578, 579 (E. D. Mo. 1984), in which it was held that lack of *legal* knowledge does not excuse the failure to file a post-conviction motion.

him of the denial. (Appendix, A5). January 19, 2000 is 98 days after Mr. Taylor was sentenced on October 12, 1999, and more than ninety days after he was delivered to the custody of the MODC. Accordingly, Mr. Taylor's failure to file a Rule 24.035 motion to assert these grounds for relief shall not bar him from asserting these grounds in this action.

The method for Mr. Taylor to assert these grounds in this action are through the 'cause and prejudice' standards for a petition for writ of habeas corpus. The 'cause and prejudice' standards hold that a person may raise post-conviction claims in habeas if a "procedural default" (here, failure to raise the claim under Rule 24.035) was caused by something "for which the defense is not responsible," and if "prejudice resulted from the underlying error that worked to his actual and substantial disadvantage." **Brown**, 66 S.W.3d at 731; *see also Covey v. Moore*, 72 S.W.3d 204, 210-11 (W. D. Mo. 2002).

Mr. Taylor's procedural default, his failure to raise his post-conviction claims during the ninety days allotted by Rule 24.035, was caused by factors external to the defense – namely, that Mr. Taylor lacked factual knowledge that he was denied entry into the LTDTP until more than ninety days after he was remanded to the custody of MODC.

Furthermore, Mr. Taylor was prejudiced by the underlying errors. Namely, Mr. Taylor is now serving multi-year prison sentences for crimes for which he had the reasonable expectation of serving less than two years in long term drug treatment,

followed by probation. *See* Section I, *supra*. The substantial difference in result constitutes prejudice.

B. Ineffective Assistance of Counsel

To demonstrate ineffective assistance of counsel, Mr. Taylor must demonstrate that (1) his plea counsel did not demonstrate the customary skill and diligence that a reasonably competent attorney would display when rendering similar services under the existing circumstances; and (2) Mr. Taylor was thereby prejudiced. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Hill v. Lockhart*, 474 U.S. 52, 58 (1985). Mr. Taylor must demonstrate that there is a reasonable probability that but for counsel's errors, he would have gone to trial. *Hill*, 474 U.S. at 59.

Mr. Taylor's plea counsel did not demonstrate the customary skill and diligence that a reasonably competent attorney would display when rendering similar services under the existing circumstances. Mr. Taylor's plea counsel rendered ineffective assistance in at least two ways.

First, reasonably competent plea counsel would have been aware of the eligibility requirements of the drug treatment program proscribed under Section 217.362 RSMo, specifically the requirement that entrants may not previously have been convicted of violent felonies. Reasonably competent plea counsel would have followed up on this legal awareness by inquiring of their client, or otherwise investigating, the question of whether their client had previously been convicted of violent felonies. Mr. Taylor's plea

counsel did neither of these things. Had he done so, he likely would have discovered Mr. Taylor's ineligibility for the LTDTP.

Second, reasonably competent plea counsel would have been aware of the requirements that Section 217.362, RSMo placed upon the trial court and MODC, specifically the requirements that the trial court "shall notify the department [MODC]" prior to sentencing, and that the offender "shall be screened by the department [MODC] to determine eligibility." **Section 217.362(2), RSMo.** Reasonably competent plea counsel would have followed up on this awareness by ensuring that the trial court and MODC conducted the statutorily-required notification and screening. Mr. Taylor's plea counsel did neither of these things. Had he done so, Mr. Taylor's ineligibility for the LTDTP would likely have been discovered, Mr. Taylor would not have pleaded guilty, but would have proceeded to trial.⁴

It is important to note that Mr. Taylor's plea counsel's ineffectiveness does not derive from the nature of any *affirmative* advice he gave Mr. Taylor in light of the information that counsel had at the time. Rather, plea counsel's ineffectiveness derives

⁴ The conclusion that Mr. Taylor's plea counsel was ineffective is buttressed by the admonishment of the Missouri Supreme Court Region IV Disciplinary Committee that Mr. Taylor's counsel "fail[ed] to represent [his] client in a competent manner" and "fail[ed] to be diligent in [his] representation of [his] client." (Appendix, A23).

from his *inaction*. This inaction consisted of plea counsel's failure to obtain the pertinent information from which to advise Mr. Taylor.

The fact that Mr. Taylor's counsel's ineffectiveness occurred at the plea stage, when he was entitled to effective assistance of counsel, distinguishes this case from those where it has been held that convicted individuals do not have a right to effective assistance of post-conviction counsel. *See, e.g., Burnside v. State*, 600 S.W.2d 157, 158 (W. D. Mo. 1980); *Sidebottom v. Delo*, 46 F.3d 744, 751 (8th Cir. 1994). Therefore, a principle expressed in those cases – that counsel's legal knowledge is imputed to his client – is not applicable where the counsel was required to render effective assistance to the client, but did not. That is the exact situation facing this Court.

The ineffective assistance of Mr. Taylor's plea counsel prejudiced Mr. Taylor. At the November 13, 2003 evidentiary hearing, Mr. Taylor established a reasonable probability that but for counsel's errors, he would have gone to trial, because he then would have known that he was not eligible for the LTDTP to which the trial court sentenced him. Therefore, the judgments in CR99-01875 and CR99-02305 should be vacated.

III. PETITIONER IS ENTITLED TO A JUDGMENT THAT HE IS UNLAWFULLY CONFINED, AND AN ORDER GRANTING HIM A WRIT OF HABEAS CORPUS AND RELEASING HIM FROM RESPONDENT'S CUSTODY, BECAUSE THE TRIAL COURT COMMITTED ERROR IN SENTENCING PETITIONER TO A LONG TERM DRUG TREATMENT PROGRAM UNDER SECTION 217.362, RSMO, FOR WHICH PROGRAM PETITIONER WAS NOT IN FACT ELIGIBLE.

This is an original writ proceeding in this Court, in which this Court is not applying a standard of review to a decision of a lower court.

A. Availability of 'Cause and Prejudice' Relief

The analysis of the availability of 'cause and prejudice' relief pertinent to Petitioner's Point III is identical to that delineated in Petitioner's Point II.A, *supra*. The arguments of Point II.A are incorporated into Petitioner's Brief Section III.A.

B. Trial Court Error

When a trial court is considering any offender for a LTDTP under Section 217.362, RSMo, the trial court "shall notify the department [MODC]" prior to sentencing. **Section 217.362(2), RSMo.** The trial court in this matter did not so notify MODC before sentencing Mr. Taylor on October 12, 1999.

When a trial court is considering any offender for a LTDTP under Section 217.362, RSMo, the offender "shall be screened by the department [MODC] to determine eligibility." **Section 217.362(2), RSMo.** MODC did not screen Mr. Taylor for such

eligibility, nor did the trial court request any such screening, before Mr. Taylor was sentenced by the trial court on October 12, 1999.

The trial court errors in this case are highly similar to those in *Brown v. Gammon*, 947 S.W.2d 437 (W. D. Mo. 1997). In *Gammon*, a habeas corpus petitioner had entered a guilty plea upon his understanding that the trial court had stated that he would be eligible for probation after successfully completing 120 days of a drug treatment program. *Id.* at 439. Petitioner completed the 120-day program, but the trial court had already accepted the Board of Probation and Parole's conclusion that petitioner was not in full completion of the program. *Id.* at 439-40. Therefore, the trial court imposed the full twenty-year sentence upon petitioner. *Id.*

The Court of Appeals held that the trial court's lack of clarity in stating on the record exactly in what manner petitioner needed to complete the 120-day program, as well as the lack of clarity in what would result from any failure to complete the program, led to the conclusion that petitioner's "guilty plea was based on a reasonable mistake of fact." *Gammon*, 947 S.W.2d at 441. The Court thereby granted petitioner a writ of habeas corpus. *Id.*

The trial court errors here are more egregious than those described in *Gammon*. There, no questions of compliance with statutory mandates were involved – a mere lack of clarity as to the effect of completion of a 120-day drug treatment program led to a writ of habeas corpus being granted. Here, the trial court errors are more serious, and similarly prejudiced Mr. Taylor. Mr. Taylor established at the November 13, 2003

evidentiary hearing that he would have acted differently and gone to trial had he known that he was not eligible for the LTDTP to which the trial court sentenced him. There is a reasonable basis to determine, as in *Gammon*, that Mr. Taylor's guilty plea was "based on a reasonable mistake of fact." Therefore, the judgments in CR99-01875 and CR99-02305 should be vacated.

CONCLUSION

Mr. Taylor is entitled to a writ of habeas corpus, releasing him from the custody of Respondent, for three independent reasons. First, the trial court acted outside its jurisdiction when it sentenced Mr. Taylor to a Long Term Drug Treatment Program without fulfilling the statutory requirements of Section 217.362, RSMo. Second, Mr. Taylor's plea counsel rendered ineffective assistance in advising Mr. Taylor to accept the offered plea before trial, which offer included sentencing to the Long Term Drug Treatment Program under Section 217.362, RSMo, without advising Mr. Taylor as to the applicability of Section 217.362, or indeed even investigating the applicability of Section 217.362. Third, the trial court erred by sentencing Mr. Taylor to a Long Term Drug Treatment Program under Section 217.362, RSMo, for which Mr. Taylor was not in fact eligible.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Petitioner's Brief complies with the limitations contained in Rule 84.06(b), contains 4,787 words, as counted by the word-processing software used, Microsoft Word, and that the floppy disk filed together with Petitioner's Brief in accordance with Rule 84.06(g) has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that one copy of Petitioner's Brief and one copy of the disk required by Rule 84.06(g) has been served on counsel for Respondent, noted below, and one copy of Petitioner's Brief has been served upon The Honorable Carl D. Gum, Jr., at the address noted below, both via First Class United States Mail.

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